

Date Mailed October 22, 2001
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BEFORE THE  
PUBLIC SERVICE COMMISSION OF WISCONSIN

Investigation Into Ameritech Wisconsin's Unbundled Network  
Elements

6720-TI-161

**ORDER REGARDING AMERITECH WISCONSIN'S AUGUST 29, 2001, MOTION TO  
SUPPLEMENT THE RECORD, AMERITECH WISCONSIN'S AUGUST 29, 2001,  
SUBMISSION OF SUPPLEMENTAL AUTHORITY AND AMERITECH WISCONSIN'S  
SEPTEMBER 6, 2001, SECOND MOTION TO SUPPLEMENT THE RECORD**

**Background**

Seven days of hearings were held in this case from Monday, February 26, through Friday, March 2, and on the following Wednesday and Thursday, March 7 and 8, of 2001. One hundred twenty-seven (127) exhibits were marked, 126 of which were admitted into the record. Exhibits 128 through 135 were identified as delayed exhibits and of those, exhibits 128 – 134 were submitted. Exhibit 135, a confidential version of exhibit 134, was not utilized by the Competitive Local Exchange Carriers (CLECs). Exhibit 136, Ameritech Wisconsin's Construction Plan, offered by Public Service Commission of Wisconsin ("PSCW") staff was placed into the record by letter dated May 23, 2001, after having received no objection to its admission. Exhibits 137, 138, and 139, the public portions of confidential exhibits 113, 114 and 21, were admitted into the record by Order dated October 4, 2001, as a "housekeeping" matter in an attempt to create a better organized record for the Commission to evaluate.

There were also two rounds of briefs, the final set of which was due July 13, 2001. The CLECs moved to strike 17 of the 25 exhibits attached to Ameritech Wisconsin's June 1, 2001,

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Initial Brief and July 13, 2001, Reply Brief. By order dated August 27, 2001, the CLECs' motion was granted.

On August 29, 2001, Ameritech Wisconsin filed a Motion to Supplement the Record with decisions from Connecticut, Michigan, and Texas, a proposed order from Illinois, and a condensed transcript of the cross-examination of Mr. James D. Dunbar, called as a witness on behalf of Sprint Communications L.P. ("Sprint") in a July 20, 2001, proceeding before the Illinois Commerce Commission. Mr. Dunbar was not a witness in this docket.

Ameritech Wisconsin filed a Second Motion to Supplement the Record dated September 6, 2001, with a Federal Communications Commission ("FCC") May 21, 2001, news release and accompanying report on local telephone competition; transcript excerpts from Dr. August H. Ankum's June 28, 2001, testimony before the Illinois Commerce Commission; and "A survey of Unbundled Network Element prices in the United States" by Billy Jack Gregg, Director, Consumer Advocate Division, Public Service Commission of West Virginia.

The CLECs (AT&T Communications of Wisconsin, L.P. and TCG Milwaukee, d/b/a AT&T Local Services ("AT&T"), MCI WorldCom, Inc. ("MCI"), McLeodUSA Telecommunications Services, Inc. ("McLeod"), TDS Metrocom, Inc. ("TDS"), Time Warner Telecom of Wisconsin, L.P. ("Time Warner"), KMC Telecom, Inc. ("KMC"), and Sprint) filed a response on September 18, 2001, along with an affidavit from Dr. August H. Ankum. Ameritech Wisconsin submitted a "Motion for Leave to File Reply Instantly" and a "Reply to the CLECs' Response to Ameritech Wisconsin's Submission of Supplemental Authority and Motions to Supplement the Record" by cover letter dated September 21, 2001, and received at the PSCW September 24, 2001.

### **Analysis**

The cross-examination of Sprint witness Mr. James D. Dunbar, Jr., before the Illinois Commerce Commission on July 20, 2001, concerned, at least in part, the CLECs' request to unbundle the Project Pronto architecture and the collocation of line cards. Ameritech Wisconsin and the CLECs present very different interpretations of Mr. Dunbar's testimony.

Ameritech Wisconsin also offered decisions from the Michigan Public Service Commission and the Connecticut Department of Public Utility Control, along with an Arbitration Award by the Public Utility Commission of Texas, and a proposed order entered by an Illinois Hearing Examiner. All four cases involve the CLECs' request to unbundle Project Pronto architecture. Again, the CLECs vehemently dispute Ameritech Wisconsin's interpretation of the decisions and challenge their admissibility.

Ameritech Wisconsin's Second Motion to Supplement the Record, includes a May 21, 2001, FCC Report entitled "Federal Communications Commission Releases Latest Data on Local Telephone Competition", an excerpt of cross-examination testimony given by Dr. August Ankum before the Illinois Commerce Commission, and the survey from West Virginia. In general, The CLECs object to the admissibility of the FCC study as being untimely, the Illinois testimony of Dr. Ankum as being irrelevant, dishonest, and misleading because the methodology used in Illinois was different, and to the West Virginia survey because it lacks adequate foundation.

*I. Ameritech Wisconsin's August 29, 2001, Motion to Supplement the Record with Mr. James B. Dunbar Jr.'s testimony from a hearing before the Illinois Commerce Commission.*

To allow partial transcripts of Mr. James B. Dunbar Jr.'s testimony from Illinois into the record after the conclusion of the hearing and as the Commission begins its deliberations would violate and subvert the integrity of the hearing process and merits little discussion in its dismissal. The hearing is over, the briefing is over and there is no meaningful way to test the veracity of Ameritech's assertions in offering Mr. Dunbar's cross-examination testimony, or for that matter, the CLECs' response. Mr. Dunbar was not a witness in this proceeding and there was not, nor is there now, an opportunity for questions that would produce "a full and true disclosure of the facts." (WIS. STAT. § 227.45) I am not aware of anything in the Wisconsin statutes or the Wisconsin Administrative Code that contemplates the partial transcripts of testimony from proceedings in other state jurisdictions being introduced into a record after the testimony in a case has been concluded. To permit otherwise would allow for an open ended process allowing for clever litigators to bring up issues anywhere in the United States that they could then hope to introduce into the Wisconsin record after the fact and without the necessary context of the Wisconsin proceeding. Reliability and relevance become difficult matters to resolve and would require at a minimum, input from all parties to maintain an impartial and informative record.

Ameritech Wisconsin's attempt to offer testimony from another jurisdiction into the record after the hearing is closed from somebody who was not even a witness in the Wisconsin proceeding undermines the goal of a fair and efficient hearing process.

II. *Decisions from Regulatory Commissions in Connecticut, Michigan and Texas, a Proposed Order by an Illinois Hearing Examiner and “A Survey of Unbundled Network Element Prices in the United States” by Billy Jack Gregg, Director, Consumer Advocate Division, Public Service Commission of West Virginia.*

To permit this type of material into the record would only perpetrate the process while adding little of substance and may even be counterproductive in creating unnecessary confusion and delay.

Additional briefing and/or testimony would also be needed to more meaningfully develop the proffered evidence (assuming relevance). At the eleventh hour of these proceedings, after all the evidence is in, the briefing is completed and the Commission readies for its decision, it is clear that WIS. STAT. § 904.03<sup>1</sup> applies and that the above-referenced cases should be excluded.

The same is true of the West Virginia Public Service Commission Unbundled Network Element (UNE) pricing survey authored by the Director of the Consumer Advocate Division (Ameritech Wisconsin provided Table 1 but not Tables 2-4). In addition, it is not enough to say as Ameritech Wisconsin does, that the document falls within a hearsay exception. A report by a member of another state agency means little without the opportunity for analysis of the report. Such opportunity for analysis would be part of a hearing process. The Public Records and Reports hearsay exception (WIS. STAT. § 908.03(8)) in and of itself does not guarantee the accuracy of the study nor does it mandate the admissibility of an entire document. Any report by any public agency anywhere in the United States is not reliable by virtue of its existence. Even if

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<sup>1</sup> **904.03 Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.** Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

admissible, the report may still be subject to debate which cannot be done in this case since the hearing is over. That the document was not available prior to the conclusion of the testimony does not mean that it can now be introduced into the record *carte blanche*. At a minimum, the methodology used and results obtained are open to discussion, analysis, and interpretations, the normal procedural safeguards of the hearing process. In particular, WIS. STAT. § 227.45(2) requires that every party have an “adequate opportunity to rebut or offer countervailing evidence.” This cannot be done, I find, without reopening the record, which would cause unnecessary delay and thus WIS. STAT. § 904.03 applies.

Because the documents in question are in the public domain they are accessible to the Commissioners as are, for example, court cases. However, I believe the possibility exists that the specific decisions Ameritech Wisconsin offers could be afforded undue weight by virtue of their being part of the record as exhibits.

*III. The Testimony of Dr. August H. Ankum Before the Illinois Commerce Commission on June 28, 2001.*

Dr. Ankum, Senior Vice President of QSI Consulting, Inc., testified during the Wisconsin proceedings on behalf of the CLEC Coalition. Dr. Ankum realized during the course of the Illinois hearing that he had made some mistakes in his calculations that required correction on the record. When asked whether he made the same errors in Wisconsin as he had in Illinois, Dr. Ankum replied, “I don’t know. I haven’t really – I haven’t gone back and looked at that.” (Ameritech’s 2<sup>nd</sup> Motion, Ex. B, page 335, lines 6 & 7) Whether or not Dr. Ankum could be classified as a party opponent (Ameritech Wisconsin argues WIS. STAT. § 908.01(4)(b), *Admission by party opponent*) he did not make an admission concerning a material fact at issue

in this docket. Dr. Ankum also submitted an affidavit in support of the CLECs' September 18, 2001, response to Ameritech Wisconsin's motions stating that one of the changes he made in Illinois is not relevant to Wisconsin and that the other mistake he made in Illinois was not made in Wisconsin. Regardless, however, of Dr. Ankum's affidavit, the Illinois transcript of his testimony offers nothing of value for the Wisconsin record and even if debatable would still be excluded, I find, under WIS. STAT. § 904.03.

*IV. FCC News Release and Report on Local Telephone Competition (May 9, 2001).*

"The CLECs take no position on the merits of the contents of Exhibit A (The FCC Report and News Release), except to note that, like all of the other documents Ameritech has attempted to introduce, it is untimely, and not necessarily of any additional benefit if added to the record." (CLEC response, p. 11) Ameritech Wisconsin notes that the CLECs cite "this very document . . . in their initial brief" (Ameritech Wisconsin's Second Motion to Supplement the Record, ¶ 7). (The CLECs cite to the News Release, Federal Communications Commission Releases Data on Local Telephone Competition (May 21, 2001) ("Local Telephone Competition Report")).

Since the CLECs have cited what Ameritech now offers as an Exhibit, the 3-page FCC News Release and accompanying 16-page report will be admitted into the record as Exhibit 140. This is done for the ease of the Commissioners' reference only, without causing, I find, any unnecessary confusion, controversy, prejudice, or delay in the decision-making process.

### **Order**

It is ordered that the Federal Communications Commission May 21, 2001, News Release Regarding Local Telephone Competition and the accompanying report entitled “Local Telephone Competition: Status as of December 31, 2000” will be admitted into the record as Exhibit 140 (19 pages total, attached).

The rest of the material Ameritech Wisconsin attempts to submit in their August 29 and September 6, 2001, Motions to Supplement the Record along with their Submission of Supplemental Authority will not be included in the record. Neither should the CLECs September 18, 2001, response or Dr. Ankum’s affidavit be part of the record nor Ameritech Wisconsin’s September 21, 2001, “Motion for Leave to File Reply Instantly” and “Reply to CLECs’ Response to Ameritech Wisconsin’s Submission of Supplemental Authority and Motions to Supplement the Record.”

The rejected materials from Ameritech Wisconsin include - 1) The partial transcript of Mr. James Dunbar’s July 20, 2001, testimony in Illinois; 2) A June 13, 2001, Connecticut Department of Public Utility Control Decision in Docket No. 00-05-06; 3) A Proposed Order entered by an Illinois Hearing Examiner in Docket 00-0393 from the Illinois Commerce Commission; 4) An Arbitrator Award from the Public Utility Commission of Texas in Docket No.’s 22168 and 22469; 5) An Opinion and Order from the Michigan Public Service Commission in Case No. U-12540; 6) Portions of Dr. August H. Ankum’s June 28, 2001, testimony before the Illinois Commerce Commission, and; 7) “A Survey of Unbundled Network



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Element Prices in the United States” by Bill Jack Gregg, Director, Consumer Advocate Division,  
Public Service Commission of West Virginia.

Dated at Madison, Wisconsin, \_\_\_\_\_

For the Commission:

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Jeffrey J. Patzke  
Administrative Law Judge

JJP:nea:g:\order\pending\6720-TI-161 Ameritech WI August 29 Motion to Supplement Record  
Attachment (Exhibit 140)